Filed 1/10/11 P. v. Tenney CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY HOWARD TENNEY,

Defendant and Appellant.

F058582

(Super. Ct. No. VCF183542)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Darryl B. Ferguson, Judge.

Thomas M. Singman, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Jeffrey A. White, Deputy Attorneys General, for Plaintiff and Respondent.

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Anthony Howard Tenney, defendant, was convicted of diversion of construction funds (Pen. Code, § 484b) and grand theft (Pen. Code, § 487a).[1] He appeals claiming the trial court erred when it refused to instruct the jury with the defense theory of anticipatory repudiation. He also contends the trial court abused its discretion by admitting evidence relating to defendant's alleged drug use and if this issue was not properly preserved, then his counsel was ineffective in failing to preserve the issue. In addition, he argues the trial court improperly calculated the restitution award, erred in failing to impose sentence before staying execution of the sentence for the grand theft, and that he is entitled to additional conduct credits under section 4019. We will modify the restitution award and amend the abstract of judgment, in all other respects, we affirm the judgment.

Facts

Jill Icenhower and her husband, Brian Icenhower, worked in the real-estate field. In the fall of 2005, they hired defendant, a general contractor, to do several jobs at different locations.

1. The Packwood Project

The Icenhowers purchased Packwood Courtyard (the Packwood project), a 12-unit apartment complex, with the goal of converting the apartments into condominiums. On March 16, 2006, they entered into a written contract with defendant for him to refurbish the interiors of the 12 units. The defendant presented the Icenhowers with two different proposals to choose from. The first proposal allowed defendant to buy materials as he did the work. The second provided for defendant to purchase all of the materials needed for the entire project up front in bulk. The Icenhowers chose the second proposal because it saved money. They were to pay defendant a total of $128,875. The Icenhowers gave defendant an initial check of $64,437.50 to be used to purchase all of the needed materials. Those materials were listed in a worksheet attached to the contract and cost

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[1] All future code references are to the Penal Code unless otherwise noted.

$58,860. The contract provided that defendant would receive additional payments of $10,739.58 at the completion of each group of two units, until the entire project was complete. One of the provisions in the contract was for defendant to safeguard all materials purchased and replace them if any were misplaced, broken, damaged, or stolen. Defendant started working on the Packwood project.

In May or June of 2006 the Icenhowers slowed defendant's work on the Packwood project because of the ongoing process of getting governmental permits. At that point, defendant had received two progress payments totaling $17,183.33. These payments were for two units that were completed, and two that were near completion. He was given the progress payments on the two nearly completed units as a courtesy because he said he needed the money.

In the meantime, defendant was given other projects to work on and he was paid for doing the additional projects.

Jill Icenhower started having concerns about the Packwood project in late July or early August 2006. Her concerns were based on a complaint from a neighbor about gunfire at the Packwood project and a change in defendant's behavior. Jill Icenhower believed defendant's personality had changed; he had a more aggressive demeanor and was sweaty when he came into the office. Defendant was called into the office to discuss the complaints from neighbors. The Icenhowers also had concerns that illegal drugs were being used and that one of defendant's friends might be living at the project. The Icenhowers asked defendant to install security cameras, so they could see who was coming and going and to try to keep the neighbors happy. Their conversation was memorialized in a letter to defendant, dated August 11, 2006. The letter stated there was currently no work being performed on the Packwood project so no construction activities should be taking place there. It stated that the Icenhowers had a zero-tolerance policy for illegal-drug use and if they learned that defendant or any of his workers were using drugs while at the site, it would be grounds for immediate termination of the contract. The

letter set forth a belief that defendant stored materials and equipment in some of the vacant units. They did not object to this storage procedure, but reminded defendant that it was his responsibility to safeguard the materials purchased to complete the project. At that point, defendant had been paid for the Packwood project with three separate checks in the amounts of $64,437.50, $17,183.33, and $2,343.86.

For about a week in September 2006, the Icenhowers lost contact with defendant. Jill Icenhower looked for him; when she could not locate him, she went to the Packwood project. Although the materials for the completion of the 12 units were supposed to be stored there, the only materials there were some windows. There were eight unfinished units. The Icenhowers subsequently received a message from defendant that he had taken another job.

On October 20, 2006, Jill Icenhower sent a letter to defendant terminating his contract because he had abandoned the Packwood project. The letter asked defendant to deliver all of the materials necessary to complete the work.

Thomas Holcom worked in the construction business and knew defendant. Defendant asked for his help in putting together a budget for the Packwood project. The proposal they came up with involved buying the materials for the project in bulk.

Holcom worked for defendant on the project. The windows for the 12 units were purchased in bulk and other items were purchased piecemeal. Holcom never saw $59,000 worth of items. Holcom testified that defendant flashed around a lot of money and was quite liberal with his money.

Holcom told Brian Icenhower that things were awry and not going as planned. After this Holcom and defendant had "words" and Holcom no longer worked with defendant.

The Icenhowers discarded the condominium idea and hired Brian Icenhower's father, Ike Icenhower, to complete the complex using cheaper products suitable for apartments. It cost $50,000 to complete the project.

Larry Snay knew Ike Icenhower. Snay went to the Packwood project and cut off the lock to the apartment where the materials for the project were supposedly stored. The apartment contained windows, but not the other materials necessary to complete the remaining 12 units.

Snay purchased the materials to finish the remaining units at the Packwood project. In addition, he had to do some light touch-up work to the four completed units. Snay completed the remaining eight units at a cost of approximately $8,000 each and completed the touch-up to the four finished units at a cost of $2,000, for a total cost of $66,000.

Mario Martin, an investigator for the district attorney's office, talked to defendant in 2007. Defendant told him he purchased over $30,000 worth of material for the Packwood project. Defendant claimed to have receipts, but never provided any to Martin. Martin reviewed defendant's bank records. Defendant had received over $83,000 from the Icenhowers and had spent approximately $33,000 for materials. Of the $19,453.76 that defendant spent at Home Depot, $13,000 was used to purchase the windows. Martin determined that defendant was not able to provide receipts for $64,500 of the Icenhowers' money.

2. The Crenshaw Project

Sometime around July 2006, the Icenhowers entered into another contract with defendant to renovate an apartment on Crenshaw (the Crenshaw project). Defendant was paid $2,622 (half of the contract price) to begin the Crenshaw project. He did not finish it. The Icenhowers wanted him to finish it because they were losing rent payments on the unit. When they could not get a hold of defendant, they hired someone else to do the work at an additional cost of $5,245.

Defense

Defendant testified on his own behalf. He testified that, when he agreed to do the Packwood project, he had never before been in charge of a project. He received half of

the $128,000 contract price up front. He purchased windows and other items for the project. He had a crew of four. He worked on the project until the Icenhowers told him to stop. They had him cease all work for at least six months while they obtained the correct permits from the City of Visalia. In addition to that project, the Icenhowers gave him other small projects including the Crenshaw project. In August defendant told the Icenhowers that, unless they could give him more work, he was going to have to go back to work as a union carpenter. Defendant was paid half of the agreed amount for the Crenshaw project and did about half of the work. He never completed work on either project. He went to jail for approximately one month for driving under the influence and when he got out, he had a falling out with the Icenhowers. He did not have any money left, having spent it on materials, labor, and salary. He drew a $10,000 salary, paid his employees in cash, and paid cash for materials at several different stores. He was not using drugs at the workplace.

On cross-examination defendant testified that he was confused about the terms of the contract regarding buying the materials in bulk. The only item he agreed to buy up front was the windows. He admitted he was not business savvy and signed the contract without reading it. Although the contract stated that he was to use the bulk of the initial Packwood project payment to buy materials, this was not the verbal agreement.

Discussion

I. Instruction on Anticipatory Repudiation

"Breach by repudiation is referred to in the case law as an 'anticipatory breach.' [Citation.] As a matter of definition, an anticipatory breach of contract occurs when the contract is repudiated by the promisor before the promisor's performance under the contract is due." (*Central Valley General Hospital v. Smith* (2008) 162 Cal.App.4th 501, 514.)

Defendant filed a motion prior to trial asking the trial court to instruct the jury on the doctrine of anticipatory repudiation. He proposed the following instruction be read to the jury:

> "A party to a contract may stop its own performance of the contract if the other party has repudiated either all of the contract, or so much of it as to impair substantially the value of the contract to the non-repudiating party.
>
> "A repudiation is a statement or action showing a clear and absolute intention not to perform one's obligations under the contract.
>
> "In this case, evidence has been presented that a witness repudiated a contract with Defendant by:
> 1) Expressing an unequivocal intent not to perform the contract at any time; or...
> 2) Taking such action as to make Defendant's performance of the contract impossible; or...
> 3) Taking action that shows an irrevocable decision not to perform the contract.
>
> "If you find that the witness repudiated the contract, that witness breached the contract and Defendant was under no obligation to continue performing his part of the contract."

The People opposed defendant's request for an instruction on anticipatory repudiation claiming anticipatory repudiation is a creature of contract law, but a violation of section 484b does not require a contract.

Initially, the court found no problem with giving an instruction on anticipatory repudiation but then subsequently agreed with the People that anticipatory repudiation was a civil contractual theory and did not apply in a criminal case.

Defendant contends the trial court erred in refusing to give his proposed instruction. He argues that the instruction related to an element of the charged offense, was the basis for a defense, and was supported by substantial evidence.

Defendant was charged with diversion of funds pursuant to section 484b. This section provides in part: "Any person who receives money for the purpose of obtaining or paying for services, labor, materials or equipment and willfully fails to apply such

money for such purpose by either willfully failing to complete the improvements for which funds were provided or willfully failing to pay for services, labor, materials or equipment provided incident to such construction, and wrongfully diverts the funds to a use other than that for which the funds were received, shall be guilty of a public offense...."

The legislative purpose of section 484b is to punish a defendant for the fraudulent conversion of funds; not the failure to comply with contractual provisions. (*People v. Howard* (1969) 70 Cal.2d 618, 623.) "In other words, liability attaches when the contractor fails to either complete the improvements or pay the costs therefor with the money obtained for that purpose." (*People v. Worrell* (1980) 107 Cal.App.3d 50, 56.) "To violate the statute all that is required is the wrongful diversion of the funds, which means not applying the funds for the purpose for which they were disbursed, and that the diversion be the cause of at least one of the described failures [failure to complete or failure to pay]." (*People v. Stark* (1994) 26 Cal.App.4th 1179, 1183-1184.)

There was evidence, undisputed by the Icenhowers, that defendant was told to stop work on the Packwood project before it was completed. The contract provided that defendant must complete the work promptly and "prosecute the Work continuously and uninterrupted with all possible speed." The directive by the Icenhowers, shifting defendant's work away from the Packwood project, could properly have been viewed as an action that made defendant's performance of the contract impossible.

One of defendant's arguments is that there was evidence from which the jury could have found that his contractual obligation was not to purchase all the materials required to complete the project, that he did purchase sufficient materials to complete some of the units, and that his failure was not a failure to pay for materials but, instead, a failure to complete the improvements for which the funds were provided. If the jury so found and also found that the Icenhowers repudiated the contract, then defendant's failure to complete the work was excused. He argues that such a theory was substantially

supported by the evidence and results in a defense that his failure to complete the construction was not the result of a diversion of construction funds and/or was not willful.

We agree with defendant that anticipatory repudiation was relevant to the question of whether he willfully failed to complete the improvements for which the funds were received and that the instruction was supported by the evidence. We find, however, that the error in not giving the instruction was harmless.

The jury was instructed that, in addition to finding that defendant either failed to complete the improvements or failed to pay for services, labor, materials, or equipment incident to such construction, they were required to find that "defendant wrongfully diverted the funds to a use other than that for which the funds were received." The jury's finding that defendant wrongfully diverted the funds demonstrates that they disbelieved his testimony that he used all of the money for the Packwood project. Having rejected his claim that he did not wrongfully divert funds from the project, the remaining evidence strongly supported the theory that the diversion of funds caused defendant's failure to complete the project and said failure was not attributable to any asserted anticipatory repudiation by the Icenhowers.

Defendant was not precluded from arguing that the Icenhowers told him to stop working on the project. The critical question was what happened to the money. On that issue, the jury found defendant wrongfully diverted the funds. Clearly, defendant could not complete the Packwood project if he diverted the necessary funds elsewhere.

Defendant claims the failure to instruct on a defense theory of the case constitutes federal constitutional error under *Chapman v. California* (1967) 386 U.S. 18 and it must be shown beyond a reasonable doubt that the error did not contribute to the verdict. It has been shown beyond a reasonable doubt that the error did not contribute to the verdict so we need not determine whether the applicable standard of prejudice was the more

stringent standard of harmless beyond a reasonable doubt or the lesser standard articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836.[2]

II. Admission of Evidence of Defendant's Use of Drugs

Throughout the trial there were multiple references to the use of drugs by defendant. He now claims the trial court abused its discretion by admitting evidence relating to his purported drug use and, additionally argues, that he did not forfeit this issue in failing to object in the trial court. As an alternate theory, he asserts that if his counsel did not properly preserve this issue, then he was deprived of the effective assistance of counsel.

Before the testimony began in defendant's trial, the People stated that one of their witnesses, Holcom, would be testifying as to drug use by the defendant. The court stated that the drug use goes to motive, but it did not think there was an issue at that point in time. Defendant did not make any objection to the admission of drug-use evidence during the pretrial motions.

Thereafter, the parties made their opening statements to the jury. The prosecutor told the jury that in August the Icenhowers went to the Packwood project and talked to defendant about drug use. The prosecutor stated that Holcom would testify that defendant was "living the high life; going out, drinking, boozing it up, doing drugs, spending the money like water...."

Defense counsel made his opening statement to the jury pinpointing weaknesses in the witnesses for the prosecution. He attacked the Icenhowers' credibility claiming they

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[2] We are not persuaded that this is a close case because the jury acquitted defendant of diversion of construction funds as charged in count three relating to the Crenshaw project. The testimony regarding the Crenshaw project by defendant was that he completed half of the project and he was paid half of the money up front to complete the project. The prosecution did not provide convincing evidence to dispute this claim by defendant.

had a financial interest in defendant's conviction. He then described Holcom and Snay as "a couple of characters." He said that Holcom was going to testify that defendant was living the high life, and using drugs. But, defense counsel claimed that Holcom was not necessarily a trustworthy character and had a reason to back up Jill Icenhower's claims.

During the testimony of Jill Icenhower, she was asked if they were concerned about the Packwood project in August. She said they were concerned and called defendant into the office where they told him they had some complaints from neighbors. She said they were concerned that illegal drugs were being used. Defense counsel objected, stating her answer was unfounded. The court overruled the objection stating it was not being offered for the truth of the matter, but to demonstrate why defendant was called into the office.

Brian Icenhower testified that after defendant told him he would no longer be working on the Packwood project, he went to the project sight and spoke to him. Brian Icenhower said they were concerned about his behavior and thought there was some serious drug use going on. Defense counsel objected based on foundation. The court stated the testimony was not being offered for the truth, but to show why the Icenhowers talked to defendant. He continued testifying and stated that he told defendant he believed he was using drugs and it had become a problem. He said they had heard things from others and had received calls from neighbors.

The court instructed the jury that it was only allowing the statement to show why Brian Icenhower was discussing these issues with defendant. The jury was immediately instructed not to consider the evidence as the truth to these things actually occurring. Brian Icenhower continued and said that defendant told him he was having marital problems at the time and there was some drug use. Defendant admitted he had used crystal methamphetamine, but he would clean up and do better. The Icenhowers decided to continue working with defendant. There was no objection to this testimony.

Brian Icenhower was asked if defendant had ever told him about prior drug-use problems. He responded, "There had been times." Defense counsel objected to the testimony as improper-character evidence. The court sustained the objection and ordered the answer to be stricken.

On cross-examination defense counsel asked Brian Icenhower if he could remember the month in which he met defendant at the sight to discuss his drug use. He responded that it was early summer.

Holcom testified that he knew defendant and worked with him on the project. He said that he socialized with defendant off the job sight every so often. Holcom said that defendant flashed a lot of money and was liberal with his money. Defendant always had a large amount of cash in his pocket.

Holcom had used drugs with defendant previously, but Holcom had stopped using drugs in January 2006. Holcom admitted he had previously been involved with writing a bad check.

Holcom was asked if he had any personal knowledge of defendant using drugs while they were working together on the Packwood project. Holcom said at the time of that project Holcom was using drugs, and had used drugs with defendant before the project. Holcom said that drug use at the project was a constant thing that happened on a daily basis. He witnessed defendant using drugs and the drug used was crystal methamphetamine. There was no objection to any of this testimony.

On cross-examination Holcom was asked how many times he observed defendant use drugs and over how long a course of time did he observe this. Defense counsel asked Holcom, "You said you saw him using drugs more or less on a daily basis at the site, correct?" Holcom replied, "Yes." Holcom agreed that he had drug problems in the past.

When Snay testified, he was asked on cross-examination if he had a valid contractor's license at the time he worked on the Packwood project, he said he did not. He was asked if he suffered a prior conviction for possession of drugs, he said he had. At

the close of cross-examination, Snay said he would like to say one thing. He did not, but on redirect the prosecution asked him what it was he wanted to say. Snay replied, "In regard to the drugs, I'm a convicted drug addict. I know exactly what the guy is going through, except I'm healed up." Defense counsel objected. Snay then said he "was the first Prop 36 graduate in this county." The court congratulated Snay and did not rule on the objection.

There was no mention of drugs during the examination of the investigator from the district attorney's office, Martin. On cross-examination defense counsel asked Martin if Jill Icenhower mentioned anything about defendant using drugs when he interviewed her in February 2007. The People objected, the court overruled the objection. Martin said she did mention drugs and that Brian Icenhower had more intimate knowledge about that subject. Martin did not include any mention in his report regarding defendant's drug use, even though he had received training in writing reports.

Martin was asked if he spoke with Holcom. He said that he did. Defense counsel asked, "And he said that he had been to wild parties where Mr. Tenney was supposedly using drugs?" Martin answered, "I don't know if he said 'wild,' but parties, yes."

During defendant's testimony, he was asked by defense counsel if he was going out partying and flashing large rolls of cash with Holcom. Defendant said he had never been out with Holcom partying. Defense counsel asked, "He also said that you were using drugs at the construction site; is that true?" Defendant said that was not true.

On cross-examination defendant testified that he never had a conversation with the Icenhowers about drug use. Defendant was questioned whether his wife accused him of drug use in their divorce papers. The court stopped the questioning finding it inappropriate, defense counsel also objected. A sidebar was held and the questioning continued. (There is no record of what occurred at the sidebar.) Defendant was asked whether his wife had ever accused him of drug use during their divorce proceedings. He said he believed she did. The prosecutor then asked, "And so the Icenhowers weren't the

only individuals that accused you of drug use in 2006?" Defense counsel objected and the court overruled the objection. Defendant explained that his wife accused him of drug use because they were battling for the children and the house. He testified that the Icenhowers mentioned that they had no tolerance for drug use on the job sight. Defendant denied admitting to the Icenhowers that he used drugs.

During his closing argument to the jury, the prosecutor stated that defendant was going to make a bundle of money on the Packwood project and a subsequent project, "[b]ut with the divorce, with the drug use, just all went away. Textbook story of drug use." There was no objection to this portion of the prosecutor's argument.

Defense counsel's closing argument repeatedly referenced drug use. Defense counsel stated that the Icenhowers were frustrated with the project because they couldn't get their permits; they were not dissatisfied with defendant's work. Defense counsel praised defendant for being honest and admitting his drunk-driving conviction. He stated that defendant honestly denied using drugs.

Defense counsel pointed out that the materials for the project could have been stolen; pointing to Holcom who admitted having drug problems, had access to the property, and had a dispute with defendant. Defense counsel argued that the assertions of drug use by the defendant began with Holcom. Defense counsel then stated that Jill had a motive to have defendant convicted of the charges. She worked for the office of the district attorney and is aware that the victim of a crime can seek restitution based on criminal convictions without having to file a civil lawsuit. In addition, defense counsel argued that Jill Icenhower might have used her position as a district attorney to influence the testimony of Snay and Holcom, who both worked without a contractor's license, to get them to testify how she wanted them to testify.

Defense counsel continued his attack on Jill Icenhower's credibility stating that, even though she had suspicions that defendant might be using drugs, she tried to find him to get him to come back to work. "[C]learly, stealing from your employer, using the

money to buy drugs, getting high at work for months at a time isn't enough" to get defendant fired. To replace defendant, the Icenhowers hired Snay, a man with drug issues in the past and the same problems that Jill Icenhower had with defendant.

Defense counsel attacked Brian Icenhower's testimony; in particular, that he was inconsistent when he talked about defendant's drug use and testified that he sent Jill Icenhower off somewhere else when he had a talk with defendant about drugs.

The testimony of Martin was challenged because he worked with Jill Icenhower at the district attorney's office. Defense counsel pointed out that Martin testified that Jill Icenhower told him about defendant's drug use when he interviewed her in February 2007, yet he did not include this information in his reports.

Defense counsel then moved on to the testimony of Holcom. He said Holcom was not trustworthy; he had a drug past and had been involved in writing a bad check. He said Holcom had a motive to stretch the truth for district attorney, Jill Icenhower, because he had practiced contracting without a license and could be prosecuted for it.

Defense counsel argued that with all of the testimony regarding daily drug use at the construction site, there was no evidence presented of any drug paraphernalia having been found at the sight. In addition, he argued that others who worked at the sight did not testify regarding defendant's drug use and the Icenhowers never claimed to have seen defendant use drugs.

Although defendant now claims the admission of evidence regarding his drug use amounts to error of reversible proportions, it is clear from his argument to the jury and his failure to make objections to the bulk of the drug-use evidence, that defense counsel had a tactical reason for allowing the admission of the drug-use evidence.

"A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the

objection or motion ….” (Evid. Code, § 353.) “‘What is important is that the objection fairly inform the trial court, as well as the party offering the evidence, of the specific reason or reasons the objecting party believes the evidence should be excluded, so the party offering the evidence can respond appropriately and the court can make a fully informed ruling.’” (*People v. Geier* (2007) 41 Cal.4th 555, 609.)

Defendant did not object to the bulk of the testimony about his drug use at trial and has forfeited his appellate challenge to this evidence. In those few instances when he did object, the court sustained the objection; or limited the evidence and so informed the jury; or the grounds he objected on are not the grounds now raised on appeal; or the evidence was cumulative and peripheral in light of the evidence which he did not object to. While defendant concedes that evidence of his drug use, as testified to by Holcom, is generally relevant to the question of motive (see *People v. Chatman* (2006) 38 Cal.4th 344, 371), he argues the trial court must then balance the probative value of the evidence against its prejudicial effect. (See Evid. Code, § 352.) He argues the trial court failed to do so here and/or abused its discretion in doing so. Again, defendant never based any of the objections he did make at trial to the admission of the drug-use evidence on Evidence Code section 352. He has forfeited this claim.

Defendant contends the issue of the admissibility of the drug-use evidence has not been forfeited because the court agreed with the prosecutor’s statement that the drug-use evidence was relevant to motive. Thus, defendant argues, any further objection would have been futile.

We disagree with defendant’s interpretation of the record. The trial court did not make a ruling on the People’s offer of evidence; it stated it did not appear there was any issue at that point in time. The court clearly left open the opportunity to raise a proper objection to the evidence, but defendant did not make an objection.

Defendant contends that if we find the issue has been forfeited by any failure to object then that failure constituted ineffective assistance of counsel. “‘“Reviewing courts

defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" [Citation.] "[W]e accord great deference to counsel's tactical decisions' [citation], and we have explained that 'courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight" [citation]. "Tactical errors are generally not deemed reversible, and counsel's decisionmaking must be evaluated in the context of the available facts." [Citation.]'" (*People v. Stanley* (2006) 39 Cal.4th 913, 954.)

As previously set forth, it is clear that defendant relied heavily on the accusations made by others, that defendant was using drugs, in formulating his defense. His decision to not object to this evidence was clearly a tactical decision that fell within the wide range of professional assistance.

Defendant asserts that the cumulative effect of the above errors requires reversal. We disagree. The only error was the error discussed in issue I., and as discussed, this error was not prejudicial.

III. Restitution Order

Defendant was found guilty in count one of diversion of construction funds based on the Packwood project. He was found guilty in count two of grand theft and the prosecutor argued that the grand theft charge was a global charge encompassing the two projects, the Packwood project and the Crenshaw project. Defendant was acquitted in count three of misdemeanor conversion of construction funds tied to the Crenshaw project.

The probation officer's report wrongly stated that defendant was convicted in count three and included in its calculation for restitution the $2,622.20 paid to defendant for the Crenshaw project. Defendant objected to the inclusion of this amount in the restitution order because defendant was acquitted in count three of diversion of funds from the Crenshaw project.

The district attorney argued that count two was a global count that included both jobs and, thus, the guilty verdict included the Crenshaw project and the additional $2,622.20 paid to defendant for the Crenshaw project should be included as restitution. The court ordered defendant to pay the entire amount of restitution ($39,928.14), which included the $2,622.20 for the Crenshaw project.[3]

Jill Icenhower testified that in September they were trying to contact defendant. She stated, "He was in the middle of remodeling our Crenshaw unit." On September 12, 2006, she went to inspect the Crenshaw unit. She testified that the unit was not completed as promised. She described the work that had been done, including the flooring had been ripped out, the apartment had been taped for painting and looked like a primer coat of paint had been done, the closet doors were removed, and there were tarps through the bathroom. She took pictures, which were shown at trial, of the work that had been done. She said there were materials and equipment at the sight and the materials would belong to her because she paid defendant up front for them. The Icenhowers paid another contractor $5,245 to complete the unit.

Defendant testified that he was about halfway through the Crenshaw project. He described the work he had done including demolishing all the interior items, sanding all the cabinets, masking everything off, making repairs to the electrical, priming all of the cabinets and walls of the unit, and repairing a utility closet. In addition, he testified he cleaned out a pile of trash from the backyard, landscaped the backyard, reseeded the grass, and removed a tree stump.

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[3] Jill Icenhower prepared a document setting forth the amount of claimed damages. It was calculated by taking the amount in the Packwood contract that was to be used for materials ($58,860.60), subtracting the cost of materials defendant purchased ($13,330.78, $1,983.38, & $3,168.50), adding in the amount paid to defendant for the Crenshaw project ($2,622.20), and subtracting the amount of the bond ($3,072) paid by defendant.

Defendant contends the trial court erred when it included the $2,622.20 from the Crenshaw project in the amount of restitution owed by defendant to the Icenhowers because he was acquitted of the diversion of construction funds in count three.

Respondent repeats the argument of the prosecutor at trial, that the grand theft count was a global count and included the Packwood project and the Crenshaw project, thus, the trial court was correct in including the Crenshaw amount in the restitution order. Defendant argues that because count two was stayed, it is clear that count two involved the same conduct that comprised count one (diversion from the Packwood project), and, thus, count two did not include the Crenshaw money. Respondent counters that if we find count two encompassed acts from both the Packwood project and the Crenshaw project, then count two cannot be stayed because it included conduct not included in count one.

"Trial courts have broad discretion to order victim restitution and such an order will not be reversed if there is a 'factual and rational basis for the amount of restitution.' [Citation.] A court's discretion is not unlimited, however, and an order will be reversed if it is arbitrary and capricious." (*People v. Rubics* (2006) 136 Cal.App.4th 452, 462.)

"While it is true that crime victims in California have a right to restitution, the right to recover from any given defendant is not unlimited. Our Constitution provides that 'It is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to restitution from the persons convicted of the crimes for losses they suffer.' (Cal. Const., art. I, § 28, subd. (b).) The Legislature has affirmed this intent, providing in [Penal Code] section 1202.4, subdivision (a)(1), that a 'victim of crime who incurs any economic loss as a result of the commission of a crime shall receive restitution directly from any defendant convicted of that crime.'

"Courts have interpreted section 1202.4 as limiting restitution awards to those losses arising out of the criminal activity that formed the basis of the conviction.

'Subdivision (a)(3)(B) of section 1202.4 requires the court to order "the defendant"—meaning the defendant described in subdivision (a)(1), who was "convicted of that crime" resulting in the loss—to pay "[r]estitution to the victim or victims, if any, in accordance with subdivision (f)." Subdivision (f) of section 1202.4 provides that "in every case in which a victim has suffered economic loss *as a result of the defendant's criminal conduct,* the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court." (Italics added.) Construed in light of subdivision (a)(1) and (3)(B), the term "criminal conduct" as used in subdivision (f) means the criminal conduct for which the defendant has been convicted.'" (*People v. Woods* (2008) 161 Cal.App.4th 1045, 1049.)[4]

Although the prosecutor argued that count two was a "global" count encompassing the Packwood project and the Crenshaw project, the Packwood project was more than sufficient to meet the burden of proving that defendant stole more than $400. The amount of losses from the Crenshaw project was not necessary to meet the threshold amount for the grand theft charged in count two. The theory of prosecution for both diversion counts and the grand theft count was the same. The jury, having come to differing conclusions of guilt on the Packwood project and the Crenshaw project, necessarily found that defendant did not divert or steal money based on the Crenshaw project. The evidence at trial supports this conclusion.

Defendant testified that he was halfway through the Crenshaw project. Jill Icenhower testified that defendant had done work on the Crenshaw project and was in the

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[4] This limitation does not apply in cases where the defendant is granted probation. (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1121.)

middle of the project. Defendant was paid half of the amount of the contract on the Crenshaw project.

Because defendant was acquitted of the diversion of construction funds for the Crenshaw project and the evidence does not support a finding that he stole money from the Icenhowers based on the Crenshaw project, the trial court erred in including this amount in the victim restitution order. For this same reason, we reject respondent's argument that count two should be imposed and not stayed because it involves criminal activity separate and apart from the activity related to the Packwood project.

The parties do not dispute the amount of $2,622.20 included in the restitution order for the Crenshaw project nor do they make any other challenges to the restitution order. Accordingly, we will reduce the victim restitution award by $2,622.20.

IV. Stay of the Sentence for Count Two

After imposing a sentence of two years in count one, the trial court stated, "In Count 2, the term on that is stayed pursuant to Penal Code Section 654." Defendant contends, and respondent concedes that if section 654 applies, the court was required to impose judgment on count two and thereafter stay execution of that count. Error to do so, it is argued, requires that we remand the case back to the trial court with instruction to impose a sentence on count two, and then stay the sentence.

"A sentence must be imposed on each count, otherwise if the nonstayed sentence is vacated, either on appeal or in a collateral attack on the judgment, no valid sentence will remain." (*People v. Alford* (2010) 180 Cal.App.4th 1463, 1469.) Here, the trial court stayed the term on the theft count, but it did not impose sentence for it, although he was validly convicted of that count. This is an unauthorized sentence. (*Id*. at p. 1472.)

Defendant and respondent both state we should remand the case back to the trial court with instructions to impose a sentence on count two. This would involve pulling defendant out of prison and bringing him back to Tulare County for a new sentencing hearing which will not change his actual prison time. Militating against such a solution is

the futility and expense of doing so. We will exercise our authority to modify the judgment pursuant to section 1260.

The trial court imposed a midterm sentence on count one. Because the grand theft involved essentially the same conduct as the diversion of construction funds, the trial court would undoubtedly have imposed the midterm sentence on the grand theft. There is no reason to believe the trial court would have treated count two any differently than it treated count one. We impose a midterm of two years in count two (§ 18) and stay execution of the sentence. (§ 654.) (See *People v. Alford*, *supra*, 180 Cal.App.4th at p. 1473.)

V. Section 4019 Credits

Under section 2900.5, a person sentenced to state prison is entitled to credit against his jail or prison term for all days spent in custody prior to sentencing. (§ 2900.5, subds. (a), (c).) Under section 4019 a defendant may also earn conduct credits, which are additional credits earned for performance of assigned labor and compliance with rules and regulations. (§ 4019, subds. (b) & (c); *People v. Dieck* (2009) 46 Cal.4th 934, 939, fn. 3.)

Defendant was sentenced on July 28, 2009, and was awarded presentence credits of 192 days actual time and 96 days conduct time for a total of 288 days. His sentence was calculated under section 4019 that was in effect at the time his sentence was imposed.

Effective January 25, 2010, section 4019 was amended to award a larger amount of presentence custody credits to eligible defendants.[5] Defendant contends that because

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[5] Section 4019 was amended by urgency legislation, operative on September 28, 2010. (Stats. 2010, ch. 426, § 2.) These amendments were expressly made to apply only to cases involving crimes occurring on or after the effective date of September 28, 2010. Thus, the new version of section 4019 does not affect this case and does not change our analysis in this matter. Unless otherwise noted, all subsequent references to section 4019

his conviction is not yet final, his conduct credits should be calculated under the more generous version of section 4019 (effective January 25, 2010) and not the less generous version in effect at the time he committed his crime. He claims the more generous credits given under section 4019 must apply retroactively to his case because the amended statute would lessen his punishment and his case is not yet final as it remains pending on appeal. In addition, defendant argues that the failure to apply the statute retroactively is a denial of equal protection under the California and federal Constitutions.[6] We disagree and conclude the amendment applies prospectively only.

Under section 3, it is presumed that a statute does not operate retroactively "'absent an express declaration of retroactivity or a clear and compelling implication that the Legislature intended [retroactive application].'" (*People v. Alford* (2007) 42 Cal.4th 749, 753.) The Legislature neither expressly declared, nor does it appear by """clear and compelling implication""" from any other factor(s), that it intended the amendment to operate retroactively. (*Id*. at p. 754.) Therefore, the amendment applies prospectively only.

We recognize that in *In re Estrada* (1965) 63 Cal.2d 740, our Supreme Court held the amendatory statute at issue in that case, which reduced the punishment for a particular offense, applied retroactively. However, the factors upon which the court based its conclusion that the section 3 presumption was rebutted in that case do not apply to the January 2010 amendment to section 4019.

We further conclude that prospective-only application of this amendment does not violate defendant's equal protection rights. Defendant cites *In re Kapperman* (1974) 11

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or its amendments refer to the version of section 4019 effective January 25, 2010, and not the newest version of section 4019.

6 This issue is currently before the California Supreme Court in several cases including our opinion in *People v. Rodriguez,* S181808, and the lead case of *People v. Brown,* S181963.

Cal.3d 542 and *People v. Sage* (1980) 26 Cal.3d 498 in support of his equal protection argument. Both *Kapperman* and *Sage* are inapposite. *Kapperman* because it involved a prior version of section 2900.5 that only allowed actual presentence credits when the defendant was delivered to the state prison on or after March 4, 1972 (*Kapperman, supra,* 11 Cal.3d at p. 544); *Sage* because it involved a prior version of section 4019 that allowed presentence conduct credits to misdemeanants, but not felons. (*Sage, supra,* 26 Cal.3d at p. 508.) The California Supreme Court found that neither limitation related to a state interest. (*Ibid.; Kapperman, supra,* 11 Cal.3d at 545.)

The purported equal protection violation at issue here is temporal, rather than based on defendant's status as a transported state prisoner or as a misdemeanant or felon. One of section 4019's principal purposes, both as formerly written and in the amendment effective January 25, 2010, is to motivate good conduct. Defendant and those like him who were sentenced prior to the effective date of the amendment cannot be further enticed to behave themselves during their presentence custody. The fact that defendant's conduct cannot be influenced retroactively provides a rational basis for the Legislature's implicit intent that the amendment only apply prospectively.

Because (1) the amendment evinces a legislative intent to increase the incentive for good conduct during presentence confinement and (2) it is impossible for such an incentive to affect behavior that has already occurred, prospective-only application is reasonably related to a legitimate public purpose. (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1200 [legislative classification not touching on suspect class or fundamental right does not violate equal protection guarantee if it bears a rational relationship to a legitimate public purpose].)

Disposition

The judgment is modified by reducing the restitution award by $2,622.20 and imposing and staying sentence on the grand theft count as described in this opinion. The trial court is directed to forward to the Department of Corrections and Rehabilitation a new abstract of judgment. As so modified, the judgment is affirmed.

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DETJEN, J.

WE CONCUR:

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HILL, P.J.

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CORNELL, J.